

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FOX TELEVISION STATIONS, LLC,

and

Case No. 02-CA-246371

TELEVISION BROADCASTING STUDIO
EMPLOYEES UNION, LOCAL 794, I.A.T.S.E.

Jacob Frisch, Esq., for the General Counsel
Kevin Casey, Esq. and Thomas E. Casey, Esq.,
of New York, New York, for the Respondent
Hope A. Pordy, Esq. (Spivak Lipton, LLP),
of New York, New York, for the Charging Party

DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. This case was tried before me in New York, New York, on March 9 and 10, 2020. On August 9, 2019, Television Broadcasting Studio Employees Union, Local 794, I.A.T.S.E (Local 794 or the Union), filed the instant charge against Fox Television Stations, LLC (Fox or Respondent). On November 22, 2019, the Regional Director, Region 2, issued a Complaint and Notice of Hearing. As amended on the record during the hearing, the Complaint alleges that on or about February 21, 2019, Fox violated Section 8(a)(1) and (5) of the Act by assigning its Public Affairs Manager to perform nonlinear editing work covered by its collective bargaining agreement with Local 794, without notifying or providing the Union with an opportunity to bargain, and without negotiating with the Union to an overall impasse regarding a successor agreement. Tr. 326-328; G.C. Ex. 25. Fox filed an Answer on December 5, 2019 denying the Complaint's material allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel (General Counsel) and Fox, I make the following

Findings of Fact

I. Jurisdiction

5 Fox admits in its Answer to the Complaint and I find that it operates television station WNYW/WWOR-TV in New York. Fox further admits and I find that during the last 12 months its business operations resulted in gross revenues in excess of \$100,000, and that it received, shipped, sold and/or purchased goods at its facilities in the State of New
 10 York valued in excess of \$5,000 directly from points outside of the State of New York. The parties have stipulated and I therefore find that at all material times Fox has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Jt. Ex. 1, ¶ 2.

15 The parties have further stipulated and I find that Local 794 is a labor organization within the meaning of Section 2(5) of the Act. Jt. Ex. 1, ¶ 3.

II. Alleged Unfair Labor Practices

A. *The Parties*

20 Fox operates two local broadcast television stations in the New York City market, WNYW-TV (Channel 5) and WWOR-TV (Channel 9) (collectively referred to as the Stations), which broadcast news, syndicated, and public affairs programming. Tr. 31, 25 76, 79. The parties have stipulated and I find that Eric "Rick" Wheeler, the Stations' Regional Vice President of Engineering, and Roselyn Barranda, the Stations' Human Resources Director, are agents of the Stations within the meaning of Section 2(13) of the Act. Lew Leone is the Stations' general manager. Tr. 140.

30 For the past 75 years, Local 794 has represented a bargaining unit consisting of technical staff at the Stations, including camera persons, technical directors, floor managers, technical operations technicians, editors, audio operators, graphic artists, and maintenance personnel. Tr. 35; Jt. Ex. 2, p. 1, 10, 12-13. At present there are approximately 115 bargaining unit employees at WNYW/WWOR. Tr. 34-35. The
 35 Union's Executive Board consists of bargaining unit employees. Nick Kroudin, a Technical Operations Technician, has been the President of Local 794 since 2006. Tr. 31-32. Donna Biglin, a Post-Production Editor, is the Union's Treasurer. Tr. 121-122. Dennis Beattie is the Union's Business Agent, Ryan Priest is its Secretary, and there are three additional Executive Board members. Tr. 135-136.

40 Nick Kroudin and Donna Biglin testified on behalf of General Counsel at the hearing. Human Resources Director Roselyn Barranda and Joseph Silvestri, who held the title of Public Affairs or Community Affairs¹ Manager at the time of the hearing, testified on behalf of Respondent.

¹ The parties stipulated that "Public Affairs" and "Community Affairs" are synonymous within the Stations' organization. Jt. Ex. 1, ¶ 9.

B. The Collective Bargaining Relationship and Nonlinear Editing

As discussed above, for a number of years Local 794 has represented a bargaining unit of technical staff at WNYW/WWOR. Fox's recognition of Local 794 and its sister local, Television Broadcasting Studio Employees Union Local 819, I.A.T.S.E., as the exclusive collective bargaining representative of these employees has been embodied in a series of collective bargaining agreements, the most recent of which was effective by its terms from October 16, 2008 through October 15, 2011 and was subsequently extended through May 11, 2012.² Jt. Ex. 1, ¶¶ 5-7; Jt. Ex. 2. Article 1, Section 1.01 of the collective bargaining agreement describes the bargaining unit in relevant part as "employees in the classifications hereinafter designated who are engaged to operate, maintain, repair, modify and re-install equipment covered hereby used by or at the television broadcasting stations." Jt. Ex. 2, p. 1. The contract in subsequent provisions describes the covered job classifications and work in additional detail. See Jt. Ex. 1, p. 10, 12-13.

The dispute in this case involves the impact of technological changes in video and audio editing on the parties' collective bargaining relationship. In the 1990's, magnetic tape was used to record video or audio material, and tape containing images and/or sounds was physically edited on two large beta tape decks, which required a specially trained technician. Tr. 66-67, 227-231, 234; R.S. Ex. 13. However, during the past 20 years software has been developed that allows material to be recorded as data on memory or "P2" cards, and then stored and edited via a software program. Tr. 66, 235. Images and sounds are now introduced as data into a database and edited in a software program on a personal computer system with external devices (in this case an AVID system). Tr. 66-67, 235-237; R.S. Ex. 16. Editing can even take place on a laptop computer. Tr. 68, 237. As a result of these technological changes, writers, reporters and producers are able to perform editing themselves without the assistance of a technician. Tr. 68.

As this new technology developed, the parties sought to address its ramifications for the work of unit employees through their collective bargaining relationship. Specifically, the parties agreed to a Sideletter to their collective bargaining agreement effective October 16, 2005 through October 15, 2008, which stated as follows:

Sideletter #8

Non-Linear Editing:

The Company recognizes that editing is under the jurisdiction of the bargaining unit and that non-bargaining unit personnel will supplement

² The bargaining unit includes the technical staff at two television stations in the Washington, DC area, WTTG and WDCA, which are not involved in the instant case. See, e.g., Jt. Ex. 2, p. 1.

bargaining unit editors only as set forth in this Sideletter. Bargaining unit editors will continue to edit promos and news pieces.

The Union agrees that the number restrictions will be lifted for the life of this agreement, and will be revisited to see whether its concerns are being met.

Only the following job categories of employees may perform non-linear editing functions, on non-engineering equipment:

- (i) Writers
- (ii) Producers
- (iii) Reporters
- (iv) Promotion Producers
- (v) Sales department employees, but not for air.

Under no circumstances will anyone be reclassified to circumvent this Sideletter. These individuals must have a direct editorial connection to the non-linear editing assignment and the piece must be one to which they were assigned. The individual's job, not editing, continues to be the primary job function of these individuals.

In all other circumstances, operation of non-linear editing will be performed by Technicians. It is not the intent of the Employer to exclude Employees from editing news features. Nothing herein shall prohibit an Employee from editing in Engineering and non-Engineering areas. The edit rooms will be updated as needed to expand the creative and the technical capabilities of these positions. Installation and maintenance of non-linear equipment in Engineering areas and in non-Engineering areas shall be performed by Technicians, subject to the provisions of the Agreement.

Editors and ENG/Editors will be trained on non-linear editing equipment first, and separate from, non-bargaining unit personnel as set forth herein. Editors and ENG/Editors may be given the opportunity to write and/or produce news material, provided the performance of such function(s) by Employees is permitted by any applicable collective bargaining agreements.

Tr. 37-38; G.C. Ex. 20, p. 72-73. None of the job titles listed in Sideletter 8 were managerial. Tr. 37-38.

The parties revisited this issue during negotiations for the collective bargaining agreement effective by its terms from October 16, 2008 through October 15, 2011.

Kroudis, who was part of the Union's bargaining committee and attended every negotiating session, was the only witness who testified regarding the negotiations. Tr.

68-69. During these negotiations, the Stations sought to expand the group of non-bargaining unit employees who were contractually permitted to perform nonlinear editing, so long as these individuals had an editorial connection to the material being produced or developed for a particular program. Tr. 71. Ultimately the Union agreed to expand the group of non-bargaining unit employees allowed to perform editing to include certain managers, as set forth in Section 1.09(b) of the October 16, 2008 through October 15, 2011 contract:

(b) Non-Linear Editing Work Assignments

The Company recognizes that editing is under the jurisdiction of the bargaining unit and that non-bargaining unit personnel will supplement bargaining unit editors only as set forth in this Section. Bargaining unit editors will continue to edit promos³ and news pieces.

Only the following job categories of employees may perform non-linear editing functions:

1. News Department Executive Producers, Senior Producers, Producers, Segment Producers, Writers and Reporters.
2. Creative Services Managers, Promotion Producers, and Marketing Producers.
3. Sales Department employees, but not for air.
4. Public Affairs Producers.

The above four listed job categories include individuals who are "upgraded" into such positions as allowed under an applicable collective bargaining agreement. Under no circumstances will anyone be reclassified to circumvent the express language contained in this Section 1.09.

Any employee, including but not limited to non-represented (Station) employees, per diem or daily employees and/or temporary employee(s) assigned to fill in a staffing vacancy in any of the categories (1) through (4) above may also perform non-linear editing functions under full effect of this Section 1.09.

Any individuals described herein must have a direct editorial connection to the non-linear editing assignment and the piece must be one to which they are assigned. The individual's job, not editing, continues to be the primary job function of these individuals.

Any employee listed in categories (1) through (4) above may edit and then push to the playback server device. In all other circumstances, operation

³ Kroudis testified without contradiction that a "promo" is a short video element created to promote an upcoming program, including a news broadcast, a special, or an episode of an ongoing series. Tr. 78-79. Promos are created by the department responsible for the program being advertised. Tr. 79.

of non-linear editing will be performed by Technicians. It is not the intent of the Employer to exclude Employees from editing news material. Nothing herein shall prohibit an Employee from editing in Engineering and non-Engineering areas. The edit rooms will be updated as needed to expand the creative and the technical capabilities of these positions. Installation and maintenance of non-linear equipment in Engineering areas and in non-Engineering areas shall be performed by Technicians, subject to the provisions of the Agreement.

Editors and ENG/Editors will be trained on non-linear editing equipment first and separate from, non-bargaining unit personnel as set forth herein. Editors and ENG/Editors may be given the opportunity to write and/or produce news material, provided the performance of such function(s) by Employees is permitted by any applicable collective bargaining agreements.

Tr. 101-102; Jt. Ex. 2, p. 9

Kroudis testified that permitting managers to perform nonlinear editing work was extremely significant for the Union, in that it was opening its jurisdiction to managerial employees for the first time. Tr. 108-109. As a result, Kroudis testified that the Union gave particular attention to the language of the provision, including which managerial job titles and functions (News Department Executive Producers and Creative Services Managers) would be included. Tr. 35-36, 109-110. Kroudis also testified without contradiction that the requirement of a "direct editorial connection" between the non-bargaining unit employee, the non-linear editing assignment and the piece itself was an important aspect of this provision, in order to protect the job function of editor for the bargaining unit employees. Tr. 88-89.

At the time of the hearing in this case the parties were bargaining for a successor agreement to the contract effective by its terms from October 16, 2008 through October 15, 2011, which was extended through May 11, 2012. According to Kroudis' uncontradicted testimony, the parties had last met for negotiations in early February 2020, and were scheduled to meet again. Tr. 33. No overall agreement for a successor collective bargaining agreement had been reached, and neither party had declared impasse. Tr. 34.

C. The Stations' Public Affairs Department and the Work of Joseph Silvestri

WNYW and WWOR broadcast programming 24 hours a day, 7 days a week. Respondent's News Department produces between 40 and 50 hours of news programming each week. Tr. 76, 214. The Creative Services Department deals with syndicated programming broadcast by the Stations. Tr. 79-80. Bargaining unit technicians work in both of these departments, as do non-bargaining unit personnel such as producers, production assistants, and managers. Tr. 79-83.

As part of their licenses from the Federal Communications Commission, WNYW and WWOR are required to produce and air programming pertinent to the community in their market areas. Tr. 286-288. In order to satisfy this obligation, the Stations produce and broadcast public affairs programming consisting of two weekly half-hour shows –

5 *Good Day Street Talk*, which airs on WNYW, and *New Jersey Now*, which airs on WWOR. Tr. 214-215; R.S. Exs. 19, 20, 36. These programs cover topics affecting the local community, including the performing arts, health, and community events. See R.S. Exs. 19, 20, 27, 28, 29, 30, 31, 36. The Stations also produce half-hour public affairs specials regarding events or topics of interest to the New York City area

10 population.

WNYW and WWOR operate out of two buildings on East 67th Street in Manhattan. Tr. 41. 205 East 67th Street is the primary building containing the majority of the Stations' employees, including its Master Control area, Creative Services, News and Public Affairs Departments, engineering, graphics, maintenance, and some editing

15 rooms. Tr. 41. 215 East 67th Street, which is connected by a stairwell, also has areas for technical work, in addition to sales and offices. Tr. 41. The Public Affairs Department was on the First Floor of 205 East 67th Street until early 2019, when it was moved to the 4th Floor of the building. Tr. 45, 124.

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The instant case involves the work of Joseph Silvestri, who at the time of the hearing held the title of Public of Community Affairs Manager. Silvestri began working at the Stations in 2005 as a public affairs coordinator. Tr. 142-143, 212-213; R.S. Ex. 1. In 2007, Silvestri became a public affairs producer. Tr. 144, 213. At that time, there

25 were two other employees producing public affairs programming – Isaura Nunez and Ronica Harris – both of whom were laid off in 2009. Tr. 166-169, 171, 214; R.S. Exs. 6, 7. Audrey Pass was the Senior Director of Community Affairs and Public Relations from 2007 through April 2015, and was Silvestri's supervisor in that position. Tr. 43-44, 191-192, 295.

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Silvestri had significant experience as a producer prior to his employment with the Stations, and immediately began producing public affairs programming when he was hired as public affairs coordinator in 2005. Tr. 212-213; R.S. Ex. 2. Silvestri testified that when producing programming he selects and researches topics to be

35 addressed on a show, identifying guests who would be appropriate to discuss the issues during the program. Tr. 219-220. He then contacts and books the guests. Tr. 220. He also writes the speaking parts for the talent who will host the show, and obtains a date for taping, securing the necessary studio and crew time. Tr. 220. On the day of the taping, he pre-interviews guests to ensure the accuracy of information, and

40 provides any necessary additions or changes to the show's host. Tr. 220. Silvestri remains present for the entire studio taping, taking notes, while the video and audio material is shot by a bargaining unit editor or technician.⁴ Tr. 220-221. As the producer, Silvestri is then involved in editing the video and audio material into a final package so that it conforms to the program time. Tr. 220-221, 225-226. After the final

45 package is prepared, Silvestri submits it to master control, which times the show and

⁴ The foregoing is roughly consistent with Kroudis' description of the work of a producer. Tr. 61-63.

prepares it for airing. Tr. 220. Silvestri then identifies the date that the show will air and schedules it. Tr. 220.

5 Silvestri testified without contradiction that he has been producing public affairs programming, including *Good Day Street Talk* and *New Jersey Now*, continuously since the inception of his employment at the Stations, and continues to do so. Tr. 212-214, 219, 290-291. Since 2009, Silvestri has been the Stations' sole employee producing public affairs programming for WNEW and WWOR. Tr. 213-214, 290-291. The websites for WNEW and WWOR have identified Silvestri as a public affairs producer since 2015. Tr. 254-260; R.S. Ex. 19, 20. Special presentations of public affairs programs aired by WNEW and WWOR identify Silvestri as a producer in their credits, and Silvestri has received Emmy Award nominations and awards as a producer on these programs since 2015.⁵ Tr. 261-273, 300-301 310-311; R.S. Exs. 21-26, 27-31, 36. Silvestri identifies himself to potential guests on *Good Day Street Talk* and *New Jersey Now* as a producer of public affairs programs or "public affairs producer." Tr. 15 273-275, 279-281, 295-296, 302, 305-306, 314-316, 320-322; R.S. Ex. 32, 33.

Since 2010, Silvestri has been editing the public affairs programs he produces for WNEW and WWOR. Tr. 221. Prior to that time, the programs were edited by a bargaining unit editor from the News Department with Silvestri present, because 20 Silvestri had a comprehensive understanding of the material and determined the final form of the finished program. Tr. 224-226. Silvestri testified that it was difficult to obtain a bargaining unit editor to work on the public affairs programs because news material which would be airing on the 5 p.m. show in particular had to take precedence given the 25 temporal constraints. Tr. 225. As a result, it was difficult for Silvestri to obtain time with a bargaining unit editor, and when working with an editor it was not unusual to be "bumped" if the editor was required to suddenly work on breaking news material for one of the daily news broadcasts.⁶ Tr. 225. Silvestri would then have to find another bargaining unit editor in the News Department and begin the editing process for the 30 public affairs program again. Tr. 225.

On March 5, 2009, Silvestri wrote to Al Shjarback, who at the time was the Stations' Vice President of Engineering. Tr. 221-222, 224; R.S. Ex. 11. In his e-mail to Shjarback, Silvestri asked whether he could receive training on the AVID system to 35 learn how to ingest, cut, and output video for footage license requests received by the Stations. Tr. 222; R.S. Ex. 11. This material would be used in other productions which would not air on WNYW or WWOR, but the work itself was performed by bargaining unit News Department editors. Tr. 222, 316-319; R.S. Ex. 11. Shjarback responded that Silvestri was not permitted to perform editing work pursuant to the current collective

⁵ While she was Senior Director of Public Affairs and Public Relations, Audrey Pass received an Emmy Award nomination as executive producer of *Good Day Street Talk* in 2013. Tr. 309-311; G.C. Ex. 23. An executive producer oversees production for the entire program, and individual producers report to them. Tr. 65, 319-320. Silvestri and Biglin testified that Donna Pisciotta was also listed in credits as an executive producer when she performed that work for a particular program, although her title at the Stations is Director of Production. Tr. 128-129, 311.

⁶ Silvestri testified that has also been "bumped" from editing rooms from News Department personnel since he began editing public affairs programming himself in 2010. Tr. 308-309.

bargaining agreement. R.S. Ex. 11. Shjarback stated that during ongoing negotiations with the Union, the company had “proposed to have all Producer’s [sic] no matter what area they work in edit, ingest, and dub,” but the Union had not agreed to that proposal. R.S. Ex. 11.

On March 25, 2010, Audrey Pass sent Shjarback a copy of the March 2009 e-mails described above, asking, “Was this issue resolved in the new contract and may Joe now edit?” R.S. Ex. 11. Shjarback responded that the issue had been resolved and that “a ‘Public Affairs’ Producer is allowed to edit,” including Section 1.09(b) of the 2008-2011 collective bargaining agreement. R.S. Ex. 11. Pass forwarded her exchange with Shjarback to Silvestri. Tr. 221; R.S. Ex. 11.

Since that time, Silvestri has been editing the public affairs programs *Good Day Street Talk*, airing on WNYW, and *New Jersey Now*, which airs on WWOR. Tr. 220-221. Silvestri testified that doing the editing himself is more efficient, because he can edit at his own convenience, without scheduling editing time and possibly being interrupted, and because he is not required to convey his intentions for the finished piece to another person. Tr. 226-227. In order to edit the public affairs programs, Silvestri brings P2 cards, which are placed into a camera and record video and audio, to the ingest area. Tr. 237-238. In the ingest area, which is operated by a bargaining unit technician, the data from the P2 card is “ingested” and transferred to the computer server, so that it can then be retrieved for editing via the AVID machines. Tr. 237-238. Silvestri typically visits the ingest area for approximately 5-10 minutes one afternoon each week. Tr. 238.

The ingest area is located in the 3rd Floor newsroom, immediately adjacent to the “TOC” area where Kroudis works.⁷ Tr. 31, 84-85, 238-239. The ingest and TOC areas are approximately five to ten steps apart, separated by a glass partition. Tr. 84-86, 238-239, 243-245; R.S. Exs. 17, 18. Thus, individuals in the ingest and TOC areas are able to see one another, and Kroudis and Silvestri both testified that they had seen one another on multiple occasions when Silvestri visited the ingest area to drop off P2 cards. Tr. 85-87, 239-241. Silvestri testified that he sees Kroudis in the TOC area almost every time he visits ingest, and they frequently exchange small talk. Tr. 241, 247. Kroudis confirmed that he saw Silvestri visit the ingest area once or twice a week during the afternoon for the past several years to hand the ingest workers P2 cards. Tr. 86-87. Silvestri testified that Kroudis had never asked him about his presence in the ingest area, or asked about his job or title, and never objected to his performing editing work prior to 2019.⁸ Tr. 247-249. Kroudis confirmed that although he sometimes spoke with Silvestri briefly, he never objected to Silvestri editing or discussed his role as producer of public affairs programming. Tr. 87-88.

⁷ Kroudis, a Technical Operations Technician, is responsible for monitoring quality control and connecting incoming signals into and out of the television station. Tr. 31.

⁸ Silvestri also testified that he works with bargaining unit photographers in the field when shooting material for the public affairs programming he produces, who provide him with P2 cards from the shoot after it is completed. Tr. 250-251. Silvestri testified without contradiction that none of these photographers objected to his editing public affairs programming. Tr. 251.

Silvestri and Donna Biglin both testified that Silvestri used a workstation approximately 5 feet from Biglin's, in a conference room on the 5th Floor of 215 East 67th Street, from March 2018 until early 2019. Tr. 137-139, 252-253. Silvestri testified that Biglin never objected to his editing, asked about his job duties, or asked whether he was a manager during that time. Tr. 253. In addition, Silvestri testified without contradiction that he saw Union Business Agent Dennis Beattie at WWOR's Secaucus, New Jersey location while taping public affairs programs from 2013 to 2017. Tr. 252.

It is undisputed on or about July 1, 2015, Silvestri's job title changed from Public Affairs Producer to Community Affairs Manager.⁹ Tr. 289; Jt. Ex. 1, ¶ 10; G.C. Exs. 4, 5. On August 12, 2015, Human Resources Director Roselyn Barranda wrote to Jean Fuentes, Senior Vice President of Human Resources, and Joseph Dorrego, then the Stations' Senior Vice President and Chief Financial Officer, requesting approval for "promotions and salary increases," as follows in relevant part:

We are requesting your approvals for the following promotions and salary increases:

- We would like to promote¹⁰ Joseph Silvestri, Public Affairs Producer to a new title of Public Affairs Manager. Joe has been the "behind-the-scenes" guru of the department, maintaining our FCC filing, in addition to producing our stations' public affairs programming and working with community leaders on a weekly basis. Currently, Joe is at ***¹¹ and we would like to increase his salary to ***. This increase is well-deserved with the new position; in addition to his newer responsibilities in managing the department.

The monies from these requests will come from savings from the departure of Audrey Pass, Sr. Director of Public Affairs position, as well as the elimination of the Staff Accountant position. The current projected savings will come from the Sr. Director of Public Affairs position that will be eliminated and may be replaced with a coordinator or lesser position. The Sr. Director's position is budgeted at plus fringe. Even if filled with a

⁹ The parties stipulated that there are no job descriptions for the Public Affairs Producer or Community Affairs Manager positions. Jt. Ex. 1, ¶13.

¹⁰ Barranda testified that the term "promotion could mean different things. In this case we gave [Silvestri] a huge bump in salary" and his "reporting structure" or supervisor changed so that he reported directly to Vice President of Programming Dan Carlin. Tr. 172, 174; G.C. Ex. 6. Barranda testified with respect to the 2015 change in Silvestri's job title that "in order to be able to receive the salary increase we have to label it and put a request for it" and "We needed to change his title in order to justify the huge increase." Tr. 172, 195. However, Barranda also testified that she needed approval in order to "assign [Silvestri] the manager role," which would entail additional responsibilities. Tr. 195-196.

¹¹ These figures were redacted by agreement of the parties.

coordinator there will be savings after the two requested salary promotions.

G.C. Ex. 5; Tr. 164, 175-176. Fuentes and Dorrego approved these requests the same day. G.C. Ex. 5. Silvestri received a salary increase of 22.60 percent on or about July 1, 2015 in connection with the change in his title to Community Affairs Manager.¹² Tr. 171-172; Jt. Ex. 1, ¶ 11; G.C. Ex. 4, 15. In a subsequent Personnel Action Form for Silvestri dated September 16, 2015 entitled "Promotion," Barranda stated that he had been "Promoted to Community Affairs Manager." Tr. 196; G.C. Ex. 4. This Form indicates that Silvestri had recently received a "salary change" due to a "Promotion," and identifies Silvestri's Community Affairs Manager position as a "mid-level manager," which Barranda described as a "managerial role" for EEO and affirmative action purposes. Tr. 196-197, 198-200; G.C. Ex. 4. The form also identifies Community Affairs Manager as a manager "job type." Tr. 197-198. A Performance Evaluation completed in September 2015 further states that Silvestri "is being promoted to Manager of Public Affairs." G.C. Ex. 15. Subsequent Performance Evaluations also refer to Silvestri as "Community Affairs Manager," and refer to his "manag[ing] the department," and being "an extremely effective manager." G.C. Exs. 16, 17, 18, 19.

Silvestri testified that he learned of the change in his job title from Dan Carlin, then the Vice President of Creative Services Programming and Public Affairs. Tr. 289. Silvestri stated that Carlin called him into his office and "notified" Silvestri that he "had been given a promotion." Tr. 289. Silvestri testified that he asked Carlin what was expected of him, and Carlin replied, "keep on doing exactly what you've been doing." Tr. 290.

Barranda and Silvestri testified that no public announcement of Silvestri's promotion and change in job title was issued, and Silvestri was not provided with new business cards or letterhead.¹³ Tr. 53, 173, 290, 293, 311. However, Silvestri updated his LinkedIn profile to describe his position as the Stations' "Manager, Public Affairs," "[r]esponsible for managing all aspects of public affairs." Tr. 312, 324; G.C. Ex. 24. Barranda and Silvestri testified that Silvestri did not have the authority to hire, discipline or assign work as a result of his change in job title. Tr. 173, 174-175, 293; G.C. Ex. 6. In order to perform a public affairs shoot, Silvestri requests that the Director of Production or the News Operations Manager, who supervise the technical crew, to assign bargaining unit staff.¹⁴ Tr. 293-294. Silvestri has continued to produce *Good Day Street Talk* and *New Jersey Now* since he became Public Affairs Manager. Tr. 173.

¹² Barranda testified that she was required to obtain Fuentes' approval for salary increases in excess of three percent. Tr. 194. Barranda testified that she did not have to obtain approval for any of Silvestri's other salary increases during his employment with the Stations. Tr. 198. Silvestri's employment benefits did not change when his job title changed and salary increased in 2015. Tr. 173, 290.

¹³ Silvestri's security credentials continued to identify him as Public Affairs Producer after his job title changed in 2015; it is apparently not necessary to update the credentials in this manner. Tr. 176-180; R.S. Ex. 8, 9.

¹⁴ Other managers, such as Director of Creative Services Ken Ashley, must follow this procedure as well. Tr. 312-313.

Silvestri was not assigned an office when he became Public Affairs Manager in 2015. Tr. 291. Instead, he occupies a workstation near the maintenance engineering shop. Tr. 291-293; R.S. Ex. 34, 35. Biglin testified that on February 21, 2019, while she was working late, she encountered Silvestri, who complained to her that he was the only manager in the department who was not given an office. Tr. 125-126. Prior to that time, Biglin had never seen any announcement or press release from the Stations stating that Silvestri was a manager. Tr. 126-127. Biglin then conferred with Kroudis to confirm that because Silvestri was a manager, he was not permitted to edit pursuant to the collective bargaining agreement. Tr. 127. Biglin told Kroudis that Silvestri was dissatisfied that despite a recently completed renovation of the 4th Floor of 205 West 67th Street, he would not have his own office as Manager of Public Affairs. Tr. 48-49. Kroudis reviewed the contract, and concluded that because Public Affairs Manager was not listed as one of the exceptions in Section 1.09(b), Silvestri was not permitted to edit. Tr. 49. Kroudis also looked Silvestri up in the directory for the Stations' internal e-mail system, which identified Silvestri as Manager Community Affairs.¹⁵ Tr. 49-50; G.C. Ex. 7. Kroudis conferred with Union Business Agent Dennis Beattie, and after Silvestri was observed editing, they began drafting a grievance to present to the Stations. Tr. 50.

On March 26, 2019, the Union filed a grievance stating that the Stations were violating the collective bargaining agreement because Section 1.09(b) did not permit Silvestri, as Public Affairs Manager, to perform editing work. Tr. 50-51; G.C. Ex. 22. Kroudis testified that a grievance meeting was conducted in May 2019 with Kroudis and Beattie present for the Union and Wheeler and Barranda attending for the Stations. Tr. 51. According to Kroudis, the sole witness to address these events, the Stations' representatives asked whether the Union objected to Silvestri's title or the work being performed, and the Union stated that both were involved, because the job title determined what work was permissible under Section 1.09(b) of the contract. Tr. 51. The Union also suggested that changing Silvestri's title could be one manner of resolving the issue. Tr. 92, 93. The Stations' representatives stated that they would look into the matter, confer with labor relations, and contact the Union. Tr. 52.

Kroudis testified that the Union raised the issue again during several meetings regarding unrelated grievances, and the Stations' representatives stated that they were still reviewing the matter and waiting for advice from an attorney. Tr. 52, 89-90. Kroudis testified that during one such meeting in July 2019, Wheeler stated that Silvestri would cease editing while the Stations' management consulted with counsel. Tr. 52, 90-91. A day or two later, Silvestri was observed editing again, and Kroudis immediately contacted Wheeler, who stated that he would take care of it. Tr. 52, 91. When Silvestri continued to edit over the next two days, Kroudis contacted Wheeler again and told him that the Union would be filing an unfair labor practice charge. Tr. 52-53, 91. Wheeler suggested that the parties meet the next day, and at the inception of the meeting Wheeler stated that the Stations intended to deny the Union's grievance. Tr. 53, 91-92. Kroudis, Beattie, and Wheeler again discussed Silvestri's job title and the

¹⁵ Kroudis testified that he and Silvestri never e-mailed one another after Silvestri's job title changed in 2015. Tr. 53-54.

work he was performing, but the parties could not reach a resolution, and on August 9, 2019, the Union filed the instant charge. Tr. 53.

III. Decision and Analysis

A. *The Parties' Contentions*

General Counsel alleges in the Complaint that the Stations violated Sections 8(a)(1) and (5) of the Act by transferring bargaining unit nonlinear editing work to a non-bargaining unit employee without notifying the Union or providing the Union with an opportunity to bargain, and without negotiating to impasse for a successor agreement. Specifically, General Counsel contends that the Stations unlawfully assigned Silvestri nonlinear editing work during his tenure as Public Affairs Manager, when that job title was not encompassed by the exceptions enumerated in Section 1.09(b) permitting nonlinear editing by certain managerial job titles. General Counsel further argues that the assignment of nonlinear editing to Silvestri was a material, substantial and significant change in the terms and conditions of employment for the bargaining unit employees, engendering an obligation on the Station's part to provide notice and an opportunity to bargain. General Counsel also contends that the assignment of bargaining unit work to a non-bargaining unit manager constituted a unilateral change in working conditions after the contract's expiration, thereby violating Sections 8(a)(1) and (5).

The Stations assert that they did not violate the Act in the manner alleged. The Stations contend that the unfair labor practice charge filed by the Union is time-barred pursuant to Section 10(b) of the Act. The Stations further argue that there has been no change in wages, hours, or other terms and conditions of employment, because Silvestri has been performing nonlinear editing since 2010 in a manner permitted by the parties' collective bargaining agreement. The Stations contend that Silvestri's change in job title to Public Affairs Manager was merely "hypertechnical," with no impact on the terms and conditions of the bargaining unit employees' employment, as opposed to a material, substantial and significant change pursuant to the relevant caselaw.

B. *Credibility and General Principles Governing Credibility Resolutions*

Although there is no dispute regarding the majority of the facts at issue here, an evaluation of witness credibility is required in certain respects. Credibility determinations involve consideration of the witness' testimony in context, including factors such as witness demeanor, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enf'd. 56 Fed.Appx. 516 (D.C.Cir. 2003); see also *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014). Corroboration and the relative reliability of conflicting testimony are also significant. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). It is not

uncommon in making credibility resolutions to find that some but not all of a particular witness' testimony is reliable. See, e.g., *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014).

In making credibility resolutions here, I have considered the witnesses' demeanor, the context of their testimony, corroboration via other testimony and documentary evidence or lack thereof, the internal consistency of their accounts, and the witnesses' apparent interests, if any. Any credibility resolutions I have made are discussed and incorporated into my analysis herein.

C. The Instant Unfair Labor Practice Charge is Not Untimely Pursuant to Section 10(b) of the Act

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." It is well-settled that the Section 10(b) period begins "only when a party has clear and unequivocal notice of a violation of the Act." *Taylor Ridge Paving & Construction*, 365 NLRB No. 168 at p. 3 (2017), quoting *A & L Underground*, 302 NLRB 467, 468 (1991). A respondent raising Section 10(b) as an affirmative defense bears the burden to establish that the charging party had clear and unequivocal notice of the violation at issue. *Id.* In order to do so, the evidence must demonstrate that the charging party had actual or constructive knowledge of the violation – that the conduct violating the Act was sufficiently "open and obvious" to provide clear notice, or that the unlawful conduct would have been discovered through the exercise of reasonable diligence. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enf'd.* 483 F.3d 628 (9th Cir. 2007), quoting *Duke University*, 315 NLRB 1291, fn. 1 (1995). In settings involving a collective bargaining relationship, a union need not "aggressively police its contracts" in order to establish reasonable diligence. *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992). Furthermore, the Section 10(b) period does not apply where a charging party's delay in filing is engendered by "conflicting signals or otherwise ambiguous conduct by the other party." *Taylor Ridge Paving & Construction*, 365 NLRB No. 168 at p. 3, quoting *A & L Underground*, 302 NLRB at 468; see also *Regency Heritage Nursing & Rehabilitation Center*, 360 NLRB 794, 809-810 (2014), *enf'd.* 657 Fed.Appx. 129 (3rd Cir. 2016) (collecting cases); *Taylor Warehouse Corp.*, 314 NLRB 516, 526 (1994), *enf'd.* 98 F.3d 892 (6th Cir. 1996).

The instant charge, filed on August 9, 2019, alleges that the Stations violated Sections 8(a)(1) and (5) by assigning a manager to perform bargaining unit editing work. G.C. Ex. 1(a). Respondent argues that because the Union was aware that Silvestri had been performing nonlinear editing continuously since his promotion to Public Affairs Manager in 2015, the charge was filed well beyond the expiration of the Section 10(b) period. There is no real dispute that the Union was aware that Silvestri has been performing nonlinear editing since 2010. However, the Stations have not met their burden to establish that the Union had actual or constructive notice that Silvestri had become the Public Affairs Manager before he disclosed this information to Biglin on February 21, 2019.

Specifically, the evidence overall does not establish that the Union would have had any reason to know that Silvestri became Public Affairs Manager in 2015. The evidence demonstrates, and the Stations do not dispute, that there was no internal or external company announcement when Silvestri became Public Affairs Manager. Nothing contradicts Kroudis' testimony that the Stations did not acknowledge Silvestri's promotion in any way, never raised the issue during bargaining, and never provided the Union with an organizational chart. Tr. 53-55. See, e.g., *Print Fulfillment Services, LLC*, 361 NLRB 1243, 1273-1274 (2014) (no constructive notice where unlawful wage increase was announced only to the employee receiving it, and was therefore not "open or obvious" to anyone else); *Mission Foods*, 350 NLRB 336, 345 (2007) (no constructive notice that employer had discontinued "employee-of-the-quarter award" where employer made no announcement and no evidence adduced that employee union representatives had learned of the change). Thus, Kroudis and the other Union officers employed at the Stations received no notice from the Stations that Silvestri's position had changed from one explicitly enumerated in Section 1.09(b) to a managerial job title that was not encompassed in the exceptions to the Union's work jurisdiction applicable to nonlinear editing.

Respondent argues that the Union failed to exercise due diligence because none of its officers employed at the Stations asked Silvestri about his job title, even though they had observed him editing on a daily basis since 2010. This argument is unpersuasive, however, because the contract violation at issue here is not contingent upon Silvestri's performing nonlinear editing work but upon the position he held while doing so. Thus, from 2010 until his promotion to Public Affairs Manager in 2015, Silvestri was in fact permitted to perform nonlinear editing pursuant to Section 1.09(b), as that provision explicitly includes the Public Affairs Producer position. Only after his job title became Public Affairs Manager was Silvestri contractually prohibited from nonlinear editing. In these circumstances, there is nothing about Silvestri's nonlinear editing work in and of itself that would have alerted the Union to a potential contract violation; such work was only prohibited after Silvestri became Public Affairs Manager. In the past, the Board has carefully distinguished when evaluating due diligence and notice of a potential violation for Section 10(b) purposes between the permissible, established assignment of bargaining unit work to non-bargaining unit employees, and a prohibited wholesale transfer of bargaining unit work to them. See *St. George Warehouse, Inc.*, 341 NLRB 904, 905, fn. 5, 922-923 (2004), *enf'd*, 420 F.3d 294 (3d Cir. 2005) (union awareness of employer's typical "use of temporary employees" to perform bargaining unit work did not constitute constructive or discoverable knowledge of employer's "transfer" of bargaining unit work to them prior the Section 10(b) period).

Furthermore, as discussed above, the evidence establishes that Silvestri's promotion from Public Affairs Producer to Public Affairs Manager – both non-bargaining unit job titles – was not announced by the Stations. As a result, the instant case is distinct from Board decisions cited by the Stations in which a Union fails to exercise due diligence because changed conditions affecting bargaining unit employees could have been discovered by "mere observation" or easily obtainable documents pertaining to the

bargaining unit employees themselves. For example, in *Moeller Bros. Body Shop*, “a minimal effort” would have alerted the union that the group of employees performing bargaining unit work was “at least double the number reported on...fringe benefit forms” submitted pursuant to the collective bargaining agreement, a “discrepancy” the union “could have readily discovered...had it visited [the employer’s] shop during operating hours.” 306 NLRB at 192. Similarly, the union in *Miramar Sheraton Hotel* could have learned of the wage increases alleged to have violated the Act by requesting wage information for bargaining unit employees, as it had done multiple times in the past. 336 NLRB 1203, fn. 1, 1252-1253 (2001). Here, by contrast, the legally significant change engendering a bargaining obligation was a change in title entirely within the purview of the Stations themselves, and not involving the bargaining unit employees. See *Moeller Bros. Body Shop*, 306 NLRB at 193 (distinguishing evidence establishing lack of due diligence from scenarios where “information regarding misconduct is only in the hands of the employer”).

The Stations argue that the Union failed to exercise due diligence in order to discover Silvestri’s promotion because Silvestri appeared in the company’s employee directory as “Manager Community Affairs, Community Service,” and updated his LinkedIn profile to describe himself as the Stations’ “Manager, Public Affairs.” G.C. Exs. 7, 24. I credit Kroudis’ testimony that he and Silvestri had no occasion to e-mail one another after Silvestri was promoted to Public Affairs Manager. Tr. 53-54. Silvestri did not contradict Kroudis’ testimony in this regard, no e-mails between the two were produced by the Stations, and there is nothing in the record to indicate that their respective work required Silvestri and Kroudis to interact beyond the pleasantries they exchanged when they happened to see one another. Furthermore, as described above, the legally significant change at issue here was entirely an issue of managerial prerogative involving the promotion of a non-bargaining unit employee who had been permitted pursuant to the collective bargaining agreement to perform nonlinear editing for five years. Thus, I find that due diligence did not require the Union to perform repeated searches of LinkedIn or the Stations’ employee directory over the years to determine whether and how Silvestri’s title had changed, given that the Stations had declined to disseminate such information entirely.

For all of the foregoing reasons, the Stations have not adduced evidence sufficient to establish that the Union failed to exercise due diligence to discover the violation alleged here prior to February 21, 2019. As a result, the charge in the instant case is not barred pursuant to Section 10(b) of the Act.

D. Respondent’s Assignment of Nonlinear Editing Work to Silvestri After His Promotion to Public or Community Affairs Manager in 2015 Violated Sections 8(a)(5) and (1) of the Act

It is well-settled that where employees are represented by a union, an employer violates Section 8(a)(1) and (5) of the Act by making unilateral changes with respect to mandatory subjects of bargaining absent bargaining to impasse. *NLRB v. Katz*, 369 30

U.S. 736 (1962). Where, as here, the union and employer are parties to a collective bargaining agreement which has expired, the employer is required to “maintain the status quo” regarding mandatory subjects of bargaining until the parties reach agreement on a successor contract or reach a good-faith impasse.¹⁶ *Richfield Hospitality, Inc.*, 368 NLRB No. 44 at p. 3 (2019), citing *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994), enf’d. 136 F.3d 727 (11th Cir. 1998); *RBE Electronics of SD*, 320 NLRB 80 at 81. The status quo is “defined by reference to the substantive terms of the expired contract.” *PG Publishing Co., Inc.*, 368 NLRB No. 41 at p. 3 (2019), quoting *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970); see also *Intermountain Rural Elec. Ass’n. v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993). The transfer of bargaining unit work to non-bargaining unit employees constitutes a mandatory subject of bargaining. *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 4 (2018), citing *Regal Cinemas, Inc.*, 334 NLRB 304, 312-313 (2001), enf’d. 317 F.3d 300 (D.C. Cir. 2003); *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 134 at p. 11 (2017). Thus, absent impasse an employer may not transfer or assign bargaining unit work to non-bargaining unit employees without providing the union with notice and the opportunity to bargain.

Contrary to the Stations’ contention, Section 1.09(b) of the contract plainly does not permit the Public Affairs Manager to perform nonlinear editing work, even where the Public Affairs Manager’s duties encompass programming production. R.S. Post-Hearing Brief at 27-29. Section 1.09(b) begins with a statement that “editing is under the jurisdiction of the bargaining unit” and that “non-bargaining unit personnel will supplement bargaining unit editors only as set forth in this Section.” Section 1.09(b) proceeds to state that “Only the following job categories of employees may perform non-linear editing functions.” Section 1.09(b) then lists the specific job titles permitted to perform nonlinear editing, ostensibly grouped by department, in four numbered paragraphs. When managerial positions, such as Creative Services Managers, are permitted to perform nonlinear editing work, Section 1.09(b) explicitly states as much. However, the only Public or Community Affairs employees listed in Section 1.09(b) are “Public Affairs Producers.” Public or Community Affairs Manager is not included, and no party disputes Kroudis’ testimony that the only managerial job titles contained in Section 1.09(b) are News Department Executive Producers and Creative Service Managers. Tr. 56.; see also Tr. 77-78, 101-102. In addition, when all employees in a particular department are permitted to perform nonlinear editing, Section 1.09(b) specifically so indicates, as paragraph 3 states that “Sales Department employees” may perform nonlinear editing so long as the material is “not for air.” By contrast, no mention is made of the Public Affairs department employees overall, as opposed to the department’s Producers, its sole explicitly enumerated title. For all of the foregoing reasons, the plain language of Section 1.09(b) does not permit the Public Affairs

¹⁶ The Stations do not contend that this general obligation was obviated by economic exigencies. See *RBE Electronics of SD*, 320 NLRB 80, 81-82 (1995), discussing *Bottom Line Enterprises*, 302 NLRB 371 (1991). No party contends that an impasse was reached during the still-ongoing negotiations for a successor collective bargaining agreement. See, e.g., Tr. 34. There is no evidence that the Stations provided the Union with notice and the opportunity to bargain regarding Silvestri’s performing nonlinear editing work after he became Public Affairs Manager in 2015.

Manager to perform nonlinear editing. Thus, pursuant to the collective bargaining agreement, Silvestri was permitted to perform nonlinear editing during the period that he held the title of Public Affairs Producer, from 2010 to 2015. However, when he became Public Affairs Manager in 2015, his title was no longer included in Section 1.09(b)'s listed positions, and he was no longer contractually permitted to perform nonlinear editing.

The Stations argue that Silvestri's performance of nonlinear editing work after he became Public Affairs Manager did not constitute an unlawful unilateral change but rather simply maintained the "status quo" given that Silvestri had been doing nonlinear editing since 2010. R.S. Post-Hearing Brief at 27. The Stations contend that Silvestri was permitted to perform nonlinear editing after he became Public Affairs Manager because the language of Section 1.09(b) permits any non-bargaining unit employee "performing the job, job function or role of 'Public Affairs Producer,'" as Silvestri continued to do, to edit public affairs programming.¹⁷ R.S. Post-Hearing Brief at 27. The Stations argue that the language of Section 1.09(b) does not refer to job titles, but rather that "job categories" denotes "job functions" or "roles," such that any individual who performed the work they encompass was permitted to perform nonlinear editing. R.S. Post-Hearing Brief at 27-28. However, the language of Section 1.09(b) leaves no doubt that the contract is enumerating specific job titles or job classifications, as opposed to simply describing the work performed by the non-bargaining unit employees that hold these positions. Thus, for example, paragraph 1 lists "News Department Executive Producers, Senior Producers, Producers, Segment Producers, Writers and Reporters," as "job categories" permitted to perform nonlinear editing, and paragraph 2 lists "Creative Services Managers, Promotion Producers, and Marketing Producers." This language clearly refers to job titles, and not to the work performed in these positions, such as identification and selection of topics and guests, research, writing speaking parts, pre-interviews of guests, and attending tapings, all work performed by the individual producing the program.¹⁸ See Tr. 219-221.

Nor does any of the other language of Section 1.09(b) support the Stations' argument that the "job categories" Section 1.09(b) contains describe work being

¹⁷ The Stations introduced evidence establishing that Silvestri has continued to produce *Good Day Street Talk* and *New Jersey Now*, as well as special public affairs programming, since he began performing nonlinear editing in 2010. The Stations introduced evidence that Silvestri has held himself out to potential guests in such a manner (R.S. Exs. 32, 33), has been identified in credits and on the Stations' websites as such (R.S. Exs. 19, 20, 21-26), and has been nominated for and received professional awards as a producer (R.S. Exs. 27-31). However, other individuals having managerial titles are also listed in production credits and receive award nominations based upon their role with respect to the specific programming involved, as opposed to their position at the Stations. Tr. 128-129, 309-311; G.C. Ex. 23. Thus, this evidence does not tend to establish that Silvestri's work as a producer somehow abrogates his Public Affairs Manager title for the purposes of Section 1.09(b), or that Silvestri's promotion to Public Affairs Manager was not a material, substantial and significant change creating a bargaining obligation, as discussed below.

¹⁸ The Stations argue that Kroudis testified that employees perform different work under more than one job title. R.S. Post-Hearing Brief at 9, 28. However, Kroudis' testimony in this regard addressed bargaining unit employees, and not employees outside the bargaining unit or management. Tr. 340-341, 350.

performed, as opposed to distinct job titles or job classifications. For example, the material immediately following the four enumerated “job categories” provides that they include “individuals who are ‘upgraded’ into such positions,” thus describing the individual entitled to perform such work by job title (“positions”), as opposed to the work performed.¹⁹ The language goes on to state that “Under no circumstances will anyone be *reclassified* to circumvent the express language” of Section 1.09(b) (emphasis added). “Reclassified” here clearly refers to job titles, positions, or job classifications, as opposed to the actual work performed. The next paragraph of Section 1.09(b) refers to non-bargaining unit employees “assigned to fill in a staffing vacancy” in any of the four “job categories;” the use of the words “staffing vacancy” connotes specific classifications or positions, and not work performed. All of this language undermines the Stations’ contention that the “job categories” in the four enumerated paragraphs of Section 1.09(b) describes work duties, as opposed to job titles or positions, as well.

Furthermore, the provision requiring a “direct editorial connection to the non-linear editing assignment” does not support the Stations’ contention that Silvestri was contractually permitted to perform nonlinear editing after becoming Public Affairs Manager by virtue of his continuing to produce public affairs programming. See R.S. Post-Hearing Brief at 27-28. For the first clause of this sentence explicitly states that it applies to “Any individuals described here,” specifically referring to the job titles listed in the four enumerated paragraphs which precede it. Thus the requirement that the non-bargaining unit individual performing nonlinear editing have a “direct editorial connection to the non-linear editing assignment” applies only to the job titles previously set forth in Section 1.09(b), the “Only...job categories of employees” that “may perform non-linear editing functions.” The requirement of a direct editorial connection therefore further circumscribes the group of non-bargaining unit employees permitted to perform nonlinear editing, as opposed to defining it. Thus, the language of Section 1.09(b) is consonant with Kroudis’ interpretation that a non-bargaining unit employee must first hold one of the job titles contained in paragraphs 1 through 4 before a direct editorial connection to the particular nonlinear editing assignment is even considered. Tr. 103.

For all of the foregoing reasons, I find that the language of Section 1.09(b) does not support the Stations’ argument that that provision permitted Silvestri to continue to perform nonlinear editing after he became Public Affairs Manager in 2015, or that Silvestri’s nonlinear editing was the legally operative “status quo” at the time he became Public Affairs Manager.

I further find that the evidence establishes that the assignment of nonlinear editing work to Silvestri after he assumed his managerial position constituted a material, substantial and significant change in the bargaining unit employees’ terms and

¹⁹ The Stations contend that Kroudis’ testimony regarding this language establishes that it refers to “job functions” or “roles” as opposed to titles. R.S. Post-Hearing Brief at 9, 27-28. However, the locution “step into the roles and perform the functions” of the listed job classifications was initially used by counsel in his questions, and not by Kroudis in his testimony. Tr. 82-83. When asked on direct examination whether the four enumerated paragraphs in Section 1.09(b) referred to “job functions or job titles,” Kroudis answered, “I would say both.” Tr. 36.

conditions of employment, such that the Stations were obligated to negotiate with the Union regarding the issue. The duty to bargain attaches only where the unilateral change is “material, substantial and significant” and affects the terms and conditions of employment for the bargaining unit employees. *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 1, fn. 2 (2018), citing *North Star Steel Co.*, 347 NLRB 1364, 1367 (2001). General Counsel bears the burden to establish that a particular change is “material, substantial and significant,” thus engendering a bargaining obligation. *Id.* The Stations contend that Silvestri’s change in job title to Public Affairs Manager was a “hypertechnical” modification without practical impact, and that there is no evidence in the record to establish lost work opportunity or wages with respect to the bargaining unit employees as a result. R.S. Post-Hearing Brief at 29-32.

However, it is well-settled that the transfer of bargaining unit work to employees outside the bargaining unit inherently constitutes a “material, substantial and significant” change engendering a bargaining obligation. See, e.g., *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 1, fn. 2, citing *Regal Cinemas*, 334 NLRB 304 (2001). The Board has repeatedly found that a transfer of bargaining unit work is material, substantial and significant even where there is no evidence that bargaining unit employees were laid off as a result, and no evidence of any impact on their wages and hours. See, e.g., *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 1, fn. 2 (no evidence of impact on employee compensation necessary to establish substantial and material change due to transfer of bargaining unit work); *Comau, Inc.*, 364 NLRB No. 48 at p. 21 (2016) (same); *Mi Pueblo Foods*, 360 NLRB 1097, 1097-1099 (2014) (transfer of bargaining unit work material and substantial even absent layoffs or significant impact on wages and hours for bargaining unit employees). The Board has stated that it is “plain” that a bargaining unit “is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit.” *Overnite Transportation Co.*, 330 NLRB 1275, 1276, *aff’d* and *rev’d* in part, 248 F.3d 1131 (3rd Cir. 2000); see also *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 1, fn. 2 (General Counsel “met his burden” to establish a substantial and material change “by showing that the Respondent transferred barge menu work – which had been exclusively performed by unit employees – to nonunit employees”).²⁰ A change in the accepted use of non-bargaining unit employees to perform bargaining unit work which engenders a transfer of unit work and erosion of the bargaining unit also constitutes a material, substantial and significant change sufficient to create an obligation to bargain. See *St. George Warehouse, Inc.*, 341 NLRB at 905, fn. 5, 923-924.

²⁰ The cases cited by the Stations in support of their argument that the Public Affairs Manager’s nonlinear editing was not a material, substantial and significant change do not involve the transfer or assignment of bargaining unit work to non-bargaining unit employees, and are therefore not persuasive. R.S. Post-Hearing Brief at 29-30; see *United Technologies Corp.*, 278 NLRB 306, 306-307, 308 (1986) (limited-time program for auditing medical bills which did not affect health insurance benefits); *Peerless Food Products*, 236 NLRB 161 (1978) (restriction of business agent’s access to production floor for conversations pertaining to union business only); *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976) (installation of time clocks to mechanize recording of arrival and departure times, where employees previously required to enter such information by hand).

Furthermore, the evidence establishes that the bargaining unit employees did in fact lose work as a result of Silvestri's continuing to perform nonlinear editing after his promotion to Public Affairs Manager.²¹ The record establishes that once Silvestri was promoted to Public Affairs Manager, there were no Public Affairs Producers permitted to perform nonlinear editing with respect to the weekly *Good Day Street Talk* and *New Jersey Now* programs, and intermittent public affairs specials. These programs would therefore have been edited by a bargaining unit employee had Silvestri not continued to edit them himself after becoming Public Affairs Manager. While these programs are only a small portion of the Stations' weekly broadcasting, they nevertheless would have involved legally significant bargaining unit nonlinear editing work. See *Ruprecht Co.*, 366 NLRB No. 179 at p. 1, n. 1, and at p. 14 (2018) (transfer of bargaining unit work to "7 temporary employees out of a total complement of about 92 employees" a material, substantial and significant change requiring bargaining). The evidence also establishes that both *Good Day Street Talk* and *New Jersey Now* air on a weekly basis, so that the nonlinear editing work they entail is recurring, as opposed to an isolated event. See *North Star Steel Co.*, 347 NLRB at 1367-1368 (single transfer of work involving .006 percent of the Respondent's total monthly production not a material, substantial and significant change creating an obligation to bargain).

In addition, Silvestri's promotion to Public Affairs Manager was not inconsequential, as the Stations suggest. The record establishes that the promotion entailed not only a change in title, but a 22.60 percent salary increase. This percentage increase is approximately ten times higher than any other salary increase Silvestri received, and required Barranda to obtain special approval from the Stations' Senior Vice President of Human Resources and Senior Vice President and Chief Financial Officer. As Public Affairs Manager, Silvestri reported directly to Daniel Carlin, then the Vice President of Creative Services Programming and Public Affairs and now the Vice President of Programming. Documents prepared by Barranda repeatedly refer to the change in job title as a "promotion," and to the Public Affairs Manager position as a "manager," and a "managerial role." Thus, the evidence establishes that Silvestri received a significant promotion when he was named Public Affairs Manager, with a substantial salary increase and a consonantly altered reporting structure. It was far from the "hypertechnical" triviality that the Stations claim.²²

²¹ The evidence overall does not establish that Respondent's Exhibit 10, a compilation of hours worked by certain employees, accurately reflects the work hours of bargaining unit editors after Silvestri began performing nonlinear editing in 2010. Barranda testified that the payroll department prepared Respondent's Exhibit 10 based upon reports of regular and overtime pay for bargaining unit employees who had worked as editors, whose names she provided. Tr. 180-183, 186-187. However, Kroudis testified that some of the individuals listed in the Exhibit were not editors but photographers or ingest operators, and some were per diem or daily hire employees not included in the bargaining unit. Kroudis further testified that some bargaining unit editors were omitted from the list. See generally Tr. 329-336. Thus, the information contained in Respondent's Exhibit 10 is not probative in terms of evaluating the Stations' contention that the bargaining unit's work and earnings were not affected by the nonlinear editing performed by Silvestri after he became Public Affairs Manager.

²² The Stations argue that the Union's suggestion to settle its grievance by changing Silvestri's title establishes that Silvestri's continuing to perform nonlinear editing as Public Affairs Manager was not a material, substantial and significant change engendering a bargaining obligation. Tr. 92-93. However, as

Finally, the evidence establishes that the impact of technological changes permitting nonlinear editing on the work traditionally performed by the bargaining unit employees was of critical importance to both the Stations and the Union. These issues were addressed in negotiations for both of the previous contracts. Such bargaining culminated in Sideletter #8 to the October 16, 2005 through October 15, 2008 agreement, a lengthy provision which permitted certain non-bargaining unit job titles to perform nonlinear editing. The next cycle of contract negotiations resulted in Section 1.09(b) of the October 16, 2008 through October 15, 2011 contract, which further expanded the group of non-bargaining unit positions permitted to perform nonlinear editing to include managerial employees, as Kroudis put it, "opening up our jurisdiction to managers for the first time." Tr. 109. This history of negotiations addressing exceptions to the Union's traditional work jurisdiction further emphasizes the material, significant, and substantial nature of the unilateral change at issue here. As a result, and for all of the reasons discussed above, the evidence overall establishes that Silvestri's nonlinear editing work after his promotion to Public Affairs Manager constituted a material, substantial and significant change in terms and conditions of employment engendering a bargaining obligation.

For all of the foregoing reasons, the evidence establishes that the Stations assigned nonlinear editing work to their Public Affairs Manager, which was not permitted pursuant to the parties' collective bargaining agreement, without notifying or providing Local 794 with the opportunity to bargain, and without negotiating with the Union to an overall impasse for a successor agreement. The evidence further establishes that the assignment of nonlinear editing work to a non-bargaining unit employee constituted a material, substantial, and significant change in terms and conditions of employment which created an obligation to bargain. As a result, the Stations' unilateral assignment of bargaining unit work to a non-bargaining unit employee violated Sections 8(a)(1) and (5) of the Act.

Conclusions of Law

1. Fox Television Stations, LLC is an employer within the meaning of Sections 2(2), (6), and (7) of the Act.

2. Television Broadcasting Studio Employees, Local 794, I.A.T.S.E., is a labor organization within the meaning of Section 2(5) of the Act.

3. Fox Television Stations, LLC, violated Sections 8(a)(1) and (5) of the Act by assigning bargaining unit nonlinear editing work to non-bargaining unit employees, specifically the Public Affairs Manager, since September 1, 2015, without providing Local 794 with notice and the opportunity to bargain, and without negotiating to impasse with Local 794 for a successor collective bargaining agreement.

Kroudis explained, such a resolution was consonant with the Union's contention that as a Public Affairs Producer Silvestri would be allowed to perform nonlinear editing pursuant to Section 1.09(b). Tr. 93.

4. The unfair labor practice described above affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and take certain affirmative action designed to effectuate the Act's policies.

Having found that Respondent violated Section 8(a)(1) and (5) by unilaterally assigning nonlinear editing work subject to its collective bargaining agreement with Local 794 to non-bargaining unit employees, I shall order Respondent to rescind the unlawful unilateral assignment and restore the status quo ante by assigning the work to the Local 794 bargaining unit, and to provide Local 794 with notice and an opportunity to bargain. I shall also order Respondent to make the bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral assignment. Backpay shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, I shall order Respondent to compensate the bargaining unit employees for any adverse tax consequences of receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, a report with the Regional Director for Region 29 allocating the backpay award(s) to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:

Order²³

Fox Television Stations, LLC, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Unilaterally assigning nonlinear editing work covered by its collective bargaining agreement with Local 794 to non-bargaining unit employees, without first notifying Local 794 and providing Local 794 with the opportunity to bargain, and without negotiating with Local 794 to an overall impasse in bargaining for a successor agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

²³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful unilateral assignment of nonlinear editing work subject to the collective bargaining agreement with Local 794 to non-bargaining unit employees.

(b) Before assigning the work of bargaining unit employees to employees outside the bargaining unit, notify and, on request, bargain with Local 794 as the exclusive collective-bargaining representative of employees in the bargaining unit described in the parties' collective bargaining agreement.

(c) Make whole the bargaining unit employees for any lost wages and benefits resulting from the assignment of nonlinear editing work subject to the collective bargaining agreement with Local 794 to non-bargaining unit employees, with interest, in the manner set forth in the remedy section of this decision.

(d) Compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or by a Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(f) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the Manhattan facility, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 1, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated Washington, D.C. August 20, 2020

A handwritten signature in black ink, reading "Lauren Esposito". The signature is written in a cursive, flowing style. The first name "Lauren" is written in a larger, more prominent script, and the last name "Esposito" follows in a similar but slightly smaller script. The signature is positioned above a horizontal line.

Lauren Esposito
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT assign work subject to our collective bargaining agreement with Television Broadcasting Studio Employees Union, Local 794, I.A.T.S.E., to non-bargaining unit employees, without first notifying Local 794 and providing Local 794 with the opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unlawful unilateral assignment of nonlinear editing work subject to the collective bargaining agreement with Local 794, until such time as Local 794 has been afforded an opportunity to bargain to an agreement or bona fide impasse over the transfer of such bargaining unit work.

WE WILL before implementing any changes in wages, hours, or other terms and conditions of employment for bargaining unit employees, notify and, on request, bargain with Local 794 as the exclusive collective-bargaining representative of employees in the bargaining unit described in the collective bargaining agreement.

WE WILL make whole bargaining unit employees for any lost wages and benefits resulting from the unlawful unilateral assignment of nonlinear editing work subject to the collective bargaining agreement with Local 794, less any net interim earnings, plus interest.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, within 21 days of the date that the amount of backpay is fixed by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

FOX TELEVISION STATIONS, LLC

(Employer)

Dated

By

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

26 Federal Plaza, Room 3614, New York, NY 10278
(212)264-0300, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/02-CA-246371> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND
MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS
CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S COMPLIANCE OFFICER (212) 264-0300.